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IN THE

Supreme Court of the United States

October Term, 1963

No. 111

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

SERVETTE, INC.,

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Reply Brief for Servette, Inc., Respondent, to Brief of Amici Curiae, American Federation of Television and Radio Artists, San Francisco Local, and National Association of Broadcast Employees and Technicians, Local 55.

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Questions Presented.

1. Whether the additional issues raised by Amici Curiae are properly and timely raised to this Court and whether they conform to this Court's policy against unnecessary consideration of constitutional issues?

2. Whether the handbilling activity falls outside of the prohibition of Section 8(b)(4)(ii) of the Act?

3. Whether Section 8(b)(4)(ii) of the Act as applied in this case is constitutional?

Statement of the Case.

The Respondent's statement of the case is set forth at pages 2-5 of its Brief to this Court filed on October 26, 1963.

Thereafter on October 28, 1963, the motion of Amici for leave to file a brief was granted by this Court.

Summary of Argument.

A. Initially, the issues raised by Amici are not properly before this Court in that they were not raised in this case by either the Board or the Respondent or by any party before the Circuit Court of Appeals. In fact the court below stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification" after that court handed down its decision. [R. 105.] This Court has repeatedly indicated that it would not entertain questions that have not been litigated in the courts below. Further, this Court has also indicated that Amici Curiae should not be allowed to inject new issues into a case.

The Court has also repeatedly held that it will not for the convenience of the parties anticipate constitutional issues, even where they might otherwise have been properly raised. The issues that Amici seek to raise in this case are presently before the Board for consideration and Amici are improperly attempting to anticipate those issues, thus circumventing their consideration both by the Board and the court below.

B. Amici disagree with both the Board and Respondent that the handbilling activity in this case was violative of Section 8(b)(4)(ii). The legislative history of that section makes it clear that Congress regarded handbilling like picketing as coercive when used in a secondary boycott against neutral employers, and that, except for the narrow and limited proviso to that section, Congress meant to prohibit such secondary activity. The Board, in taking the position that the union's handbilling activity constituted coercion, properly interpreted the meaning of Section 8(b)(4)(ii). The facts in this case further show that the handbilling did, in fact, bring about the coercion prohibited by the Act.

C. This court has repeatedly indicated that the first amendment does not protect speech that, when joined with a course of conduct, is aimed at some unlawful end. *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1946). Amici continually confuse the prohibition against "threat, coercion or restraint" as set forth in Section 8(b)(4)(ii). The test is not coercion of the consumer, but that of the neutral employer. And here the record is clear that the union primarily intended to coerce neutral employers and was successful in so doing. Whatever effect handbilling may have on the public says nothing of its effect on the employer. Employers were in fact coerced into diminishing or ceasing their business with the Respondent, even if consumer response itself may have been uncoerced.

Amici are further in error in treating picketing and handbilling as if at the opposite ends of some constitutional spectrum. Where, as here, the handbilling is done at the *locus in quo* of neutral employers for an object forbidden by Congress, and is, therefore, no less prohibitive than picketing, such activity is not constitutionally protected. The union conducted no mere "informational exercise." Its admitted aim was to promote a boycott by dealers and consumers of Servette products. In so doing both its means and its objective were unlawful and therefore such activity is not constitutionally protected.

ARGUMENT.

I.

The Issues Raised by Amici Are Not Properly Before This Court.

Respondent has heretofore objected to consideration by the Court of those issues that Amici Curiae seek improperly to inject into this case. [Objection to Brief Amici.] Respondent repeats herein, in part, its prior arguments in support of its objection, in the event the Court has not thus far reached them on the merits.

The sole issue before this Court with respect to Section 8(b)(4)(ii) of the National Labor Relations Act is whether a boycott by a union of neutral parties is exempted from violating the Act by virtue of the second proviso to that section. Amici Curiae seek to raise two additional questions, to which Respondent objects on the following grounds:

1. Neither question is timely raised to the Court in accordance with its long-standing rule that issues shall come to the Court only after they are orderly adjudicated in the courts below.

The court of appeals in this case ruled in response to a motion for clarification filed by the National Labor Relations Board that these issues were not properly before the court. They were raised neither by the Board in its opinion nor by either party to the court of appeals in briefs or argument. The court stated that "the first intimation of such grounds in the instant case was raised on the motion for clarification." [R. 105; 313 F. 2d 66, 67.] Amici Curiae are incorrect in suggesting that the court refused to consider these questions solely on the ground of Section 10(e) of the

Act. Before noting the applicability of that section, the court relied on its holding in *Partenweederei, MS Belgrano v. Weigel*, 313 F.2d 423 (9th Cir. 1962), in which the court ruled:

> It is sound policy to require that all claims be presented to the trial court, and not raised for the first time on appeal, nor, a fortiori, as herein, in a petition for rehearing on appeal. This requirement sets the scope of the lawsuit, thereby preventing piecemeal litigation and consequent waste of the time of both trial and appellate courts. It assures that the opposing party will know the claims he must meet. It gives the appellate court the benefit of the district court's wisdom, and it prevents a litigant from asserting before this Court a claim which he deliberately chose, for reasons of strategy, not to assert below.

(313 F. 2d 423, 425.) Clearly, Amici are in error in asserting that the court below primarily grounded its refusal to consider these questions on Section 10(e) of the Act. That court quite properly held that the failure to present these issues prior to the motion for clarification precluded their consideration. Manifestly, then, even greater reasons argue against this Court's entertaining these questions now.

See also,

Rescue Army v. Municipal Court, 331 U. S. 549 (1947);

United States v. Singer Mfg. Co., 374 U. S. 174, 175 n. 1 (1963).

2. Amici Curiae should not be allowed to inject into this case issues not raised by the parties.

Amici Curiae concede that neither the National Labor Relations Board nor the Respondent has raised to the Court the issues that Amici seek to raise. (Motion for Leave to File a Brief Amici Curiae, p. 5, par. 4.) Briefs Amici Curiae are not favored by the Court (United States Supreme Court Rules, Rule 42, Section 1); and in any event Amici Curiae should not be allowed to inject new issues into this case. *Knetch v. United States*, 364 U.S. 361, 370 (1960).

3. The asserted constitutional question is premature and not timely raised, and thus does not conform to this Court's policy against unnecessary consideration of constitutional issues.

The question whether a boycott is illegal does not raise a first amendment issue. If it did, every case involving the construction of a statute prohibiting boycotts—the Sherman Act, for example—would present a free speech issue. This Court has repeatedly held that it will not for the convenience of the parties anticipate constitutional issues even where they might otherwise have been properly raised. *United States v. Hayman*, 342 U. S. 205 (1952); *Parker v. County of Los Angeles*, 338 U. S. 327 (1949); *Honeyman v. Hanan*, 300 U. S. 14 (1937). This Court analyzed its policy in *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947), when it stated, at page 570:

> Moreover the policy is neither merely procedural nor in its essence dependent for applicability upon the diversities of jurisdiction and procedure, whether of the state courts; the inferior federal courts, or this Court. Rather it is one of substance, grounded in considerations which transcend all

such particular limitations. Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure.

(4) The very questions raised by Amici Curiae are before the National Labor Relations Board in another action and await decision in the orderly process of judicial administration.

Amici Curiae are parties to NLRB Case No. 20-CC-234, which is presently before the National Labor Relations Board upon remand by the Court of Appeals for the Ninth Circuit to the Board for its consideration of the issues raised by Amici Curiae. *Great Western Broadcasting Corporation v. NLRB*, 310 F. 2d 591 (9th Cir. 1962).

Amici Curiae not only attempt to anticipate those issues here, but to circumvent their consideration by the National Labor Relations Board and the Ninth Circuit Court of Appeals in the *Great Western Broadcasting* case. The presentation of those issues would be untimely and would prevent the Court from having the wisdom and judgment of the lower courts. In *Great Western Broadcasting*, the lower courts would be deprived of their usual function, to hear and judge these issues in the orderly course of judicial administration.

II.

Congress, in Adopting Section 8(b)(4)(ii), Clearly Intended to Prohibit Secondary Boycott Activity That Threatens, Coerces, or Restrains a Neutral Employer Into Ceasing Business With a Primary Employer, and Handbilling at the Neutral Employer's Place of Business, Like Picketing, Has Properly Been Considered Within That Prohibition.

Aside from the different interpretation each gives to the second proviso to Section 8(b)(4), the Board and Respondent are in agreement that "Distributing handbills outside a retail store requesting potential customers not to purchase the goods of a particular supplier, like Servette, would be an unfair labor practice under Section 8(b)(4)(ii), because the union would be coercing or restraining the retailer with the object of forcing it to cease dealing in the products of the supplier. . . ." (Board's Pet. for Cert. p. 12)[1]

The legislative history of Section 8(b)(4)(ii) shows that Congress, in considering (ii)'s intended scope, had the question of handbilling before it and carefully refused to exempt handbilling from the sec-

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[1] In addition, the Board based its ruling below on *Lohman Sales Company*, 132 NLRB 901, 904 (1961), where it stated that handbilling "might constitute restraint and coercion" but for the proviso. And in *Local 662, Radio and Television Engineers' (Middle South Broadcasting Co.)*, 133 NLRB 1698, 1705 (1961), the Board stated, "We also agree with [the trial examiner's] finding that, unless protected by the proviso to Section 8(b)(4), Respondent's circulation and distribution of the 'Do Not Patronize' leaflets urging a consumer boycott of secondary employers still advertising on [the struck radio station] would constitute 'restraint or coercion' within the meaning of Section 8(b)(4)(ii)(B) in violation of that Section."

tion except to the extent covered by the very narrow exclusion in the second proviso.

The Landrum-Griffin bill, introduced in the House, contained the provision presently before the Court.[2] After passing the House with the (ii) provision, the bill went to the Conference Committee together with its Senate counterpart, the Kennedy-Ervin bill. Senator Kennedy and Congressman Thompson prepared an analysis of the Landrum-Griffin bill and objected to Section 8(b)(4)(ii) because of its ban, not only on consumer picketing of a secondary employer's premises, but also on other forms of consumer appeals, such as handbilling. They noted:[3]

> The House bill provides that a union may not "restrain" or "coerce" an employer where an object is to require him to cease doing business with any other employer. The prohibition reaches not only picketing but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.
>
> Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors Beer during the strike. It can picket the bars and restaurants which sell Coors Beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

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[2]Section 705(a) of H. R. 8400, I Leg. Hist. 681.
[3]105 Cong. Rec. 16591, II Leg. Hist. 1708.

The House bill outlaws such appeals to the general public for assistance in winning fair labor standards.

The Conference Committee adopted the Landrum-Griffin provision over these objections, but added a separate proviso to limit its ban on consumer appeals. The proviso exempted from the section certain forms of publicity other than picketing in "narrow and limited" situations not presented here.[4] Otherwise, Congress demonstrated by having the Kennedy-Thompson objections placed squarely before it that handbilling was very much in its mind; that it regarded handbilling, like picketing, as coercive when used in a secondary boycott; and that—except for the proviso—it meant to prohibit its use in these situations.[5] The legislative history clearly demonstrates that the Senate yielded and agreed to the House position on this point.[6]

It is also clear that Congress intended to prohibit secondary picketing and handbilling at the premises of the neutral employer, when for the unlawful purposes set forth in Section 8(b)(4), without any initial show-

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[4]105 Cong. Rec. 19771, II Leg. Hist. 1857; 105 Cong. Rec. 17898—17899, II Leg. Hist. 1432. See also remarks of Congressman Griffin, who stated:

> The courts also have held that, while a union may not induce employees of a secondary employer to strike for one of the forbidden objects, *they may threaten the secondary employer*, himself, *with* a strike *or other economic retaliation* in order to force him to cease doing business with a primary employer with whom the union has a dispute. *This bill makes such coercion unlawful* by the insertion of a clause 4(ii) forbidding threats or coercion against "any person engaged in commerce or an industry affecting commerce." II Leg. Hist. 1523.

[5]See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 274 (1959).

[6]105 Cong. Rec. 17328, II Leg. Hist. 1378.

ing that the union's activity caused actual injury to the neutral employer. *Burr and Perfection Mattress & Spring Company v. NLRB*, 321 F.2d 612 (5th Cir. 1963).[7] Pointing out that such a strained interpretation of Section 8(b)(4) deprives subsection (ii) of any real utility, that court stated (at 620-621):

> The fallacy of the approach of the *Fruit & Vegetable* case is demonstrated by the fact that its standard effectually deprives §(ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under as some did in *Servette, Inc.* * * * what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions which would inhere in every secondary consumer picketing dem-

[7] Amici argue that "[handbilling] may or may not result in persuading a sufficient number of consumers to take a stand that will bring about a diminution of profits by non-union business." (Amici Brief, p. 16.) But actual economic loss to the employer is not the issue, since there is no Congressional mandate that the employer lose profits, but only that he be coerced, which may well come before or even without a loss of sales and profit.

> onstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered. [Footnote omitted.]

Even the court in *Fruit and Vegetable Packers & Warehousemen v. NLRB*, 308 F.2d 311 (D.C. Cir. 1962) pointedly did not distinguish between picketing, on the one hand, and the type of handbilling involved here on the other. The court of appeals in that case stated (at 315):

> Looking solely to the language of the statute, however, we believe the most plausible reading to be that §8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation "publicity other than picketing" even though it threatens, coerces or restrains an employer. For example, handbilling which has a severe economic impact on the secondary employer's business might be "coercive" *but it would be exempted from regulation by the proviso.* (Emphasis added.)

While both the Board and Respondent disagree with the basic position set forth by the court of appeals in *Tree Fruits*, that court in turn disagrees with the still different interpretation given to the statute by Amici, and expressly recognizes that Section 8(b)(4)(ii) undoubtedly covers both picketing and handbilling. Only the proviso, to the extent applicable, makes such

a distinction. Amici's efforts to remove handbilling from the statute altogether (Amici Brief, p. 23, *et seq.*) not only would make the proviso itself meaningless, but receive no support from the legislative history of Section 8(b)(4)(ii) or the cases that have thus far examined the statute.

In reality, no meaningful or logical distinction can be found between picketing and handbilling at the premises of the neutral employer, for as the Board and the courts in the *Burr* and *Tree Fruit* cases recognize, Congress intended to make unlawful secondary boycott activities that "threaten, coerce or restrain" neutral persons; and in this context handbilling at the *locus in quo* wears all the vestments of picketing. There is in fact considerable authority holding that "picketing" includes handbilling at the *locus in quo*.[8]

It has, moreover, been recognized since *Eastern States Lumber Ass'n v. United States*, 234 U. S. 600, 614 (1914), that even the peaceful circulation of a blacklist constitutes coercion, for in that case the Court held that certain retailers violated the antitrust laws "by placing obnoxious wholesale dealers under the *coercive* influence of a condemnatory report circulated among others."[9] Particularly in point is *Paramount Pictures*

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[8]See Restatement of Torts, Sec. 779, Comments f through i; *Kitty Kelly Shoe Corp. v. Retail Employers*, 125 N. J. Eq. 250, 5 A. 2d 682, 684 (1939); *Mason and Dixon Lines v. Odom*, 193 Ga. 471, 18 S. E. 2d 841, 844 (1942). *Cf. Teamsters Local 695 v. Vogt*, 254 U. S. 284, 289 (1957); *Business Service Employees v. Gassam*, 339 U. S. 532, 537 (1950).

[9](234 U. S. 614). Similarly, in *Lorain Journal v. United States*, 342 U. S. 143 (1951), the Court held that an attempt by a newspaper publisher to force its advertisers to boycott a radio station constituted an unlawful restraint (see 342 U. S. 152-155, particularly p. 154, n. 8). Also, in *Professional & Business Men's L. I. Co. v. Bankers Life Co.*, 163 F. Supp. 274,

v. United Motion Pictures T.O., 93 F. 2d 714 (3rd Cir. 1937), in which a number of theater owners threatened to ask the public by pamphlets, letters, and other publicity not to patronize theaters playing Paramount Pictures. There was no showing of violence, and defendants disclaimed any threat to picket the theaters (93 F. 2d 718), but the court held that their conduct was nonetheless coercion (93 F. 2d 720).

Finally, the Board's determination that the Union's handbilling activity constituted coercion *per se* within the meaning of Section 8(b)(4)(ii) should be given deference and weight by this Court. As this Court has said, "Congress has entrusted the administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience." *San Diego Bldg. Trades Council v. Garmon*, 359 U. S. 236, 242 (1959); *NLRB v. Hearst Publications, Inc.*, 322 U. S. 111, 130, 131 (1944). The Board's determination, based upon its expertise, is supported not only by the legislative history of the Act and the leading cases that have interpreted it, but by all the evidence in this case.[10]

281-283. (D. Mont. 1958), the court held illegal a boycott accomplished by newspaper advertisements and leaflets, which induced members of the public to refrain from patronizing plaintiff.

[10]Of course, the record clearly shows that there was coercion in fact. The record shows that in some instances the union threatened employers and store managers that the union would pass out handbills and on many other occasions did carry through its threat. [R. 55-67.] At times the threat alone had the effect of causing the employer to cease doing business with Servette and causing store managers to refuse to perform services for their employers. [R. 63-64.] At other times the stores ceased doing business with Servette only after the handbilling had commenced. [R. 59-61.]

III.

Section 8(b)(4)(ii) as Applied in This Case Is Constitutional.

Even before this Court handed down *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490 (1946), it was clear that the first amendment does not protect speech that, when joined with a course of conduct, is aimed at some unlawful end. This Court said in *Giboney* (336 U. S. at 502):

> [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language, either spoken, written or printed.

In that case a state statute prohibited the coercion of a neutral party into refusing to deal with the parties to a labor dispute. The Court expressly rejected the union's assertions that, notwithstanding the statutory prohibition, it had a constitutional right to publicize the facts of the dispute and that such publicity could be separated from other coercive acts. (336 U. S. 498, 502).

This Court upheld that same principle in *IBEW v. N. L. R. B.*, 341 U. S. 694 (1951). There the Court took the position that the prohibition of a secondary boycott by picketing and a telephone call "carries no unconstitutional abridgement of free speech." (341 U. S. 705).[11] In support of its conclusion this Court cited and approved *NLRB v. United Brotherhood*, ... F.2d 60, 62 (10th Cir. 1950), and *United Brotherhood of Carpenters, etc. v. Sperry*, 170 F.2d 863, 868-

[11]The Court in *Electrical Workers* also held (341 U. S. 700-701) that the prohibition of a secondary boycott was not inconsistent with section 8(c) of the Act (29 U. S. C. 158(c)).

869 (10th Cir. 1948); (see 341 U. S. 705 n. 9). Both cases upheld a prohibition of the circulation of a blacklist.

> *The promulgation and circulation of a blacklist* and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment or section 8(c) of the act. Concretely, neither the constitutional nor statutory provision protected appellants *in their* blacklisting of [the neutral] Klassen and their picketing of its premises as a means of waging a secondary boycott against that company, with substantially harmful effect upon interstate commerce. (Emphasis added.)[12]

Congress enacted Section 8(b)(4)(ii) to reach precisely what that section states: any threat, coercion, or restraint of any person for the purpose of forcing or requiring him to cease doing business with any other person. Congress drew no distinction between action that threatens or coerces and words that do the same. Coercion was forbidden, no matter what the means used to achieve it.

The Board, Respondent, and now Amici agree that the union's handbilling sought to "demonstrate to the store owner that continued handling of Servette goods during the strike was not profitable." (Amici Brief, p. 15.) The union itself regarded the handbilling as part of its campaign "to enlist the aid and cooperation of retail markets handling and stocking the products

[12] *United Brotherhood of Carpenters, etc. v. Sperry*, 170 F.2d 863, 869 (10th Cir. 1948). In the *Electrical Workers* case (341 U. S. at 701 n. 6) the Court also quoted a similar passage.

distributed by Servette in the [union's] strike against Servette and to promote a boycott by dealers and consumers of those products." [R. 75.]

Finally, the record itself is replete with evidence of the union's success with its handbilling activity and indicates that more than once such activity effectively coerced neutral employers. The prime object of the union was therefore attained. Purchases from Servette by neutral employers thereupon either diminished or stopped completely. [R. 59-61; 63-64.]

Amici acknowledge the union's intent to force store owners to cease purchasing Servette products and furthermore admit the coercive effect of the union's efforts. They, nonetheless, still contend that the handbilling here is constitutionally protected because it was ostensibly directed to the consumer, whose response is allegedly purely uncoerced and spontaneous. Amici confuse coercion of the consumer—not the test here—with the prohibited coercion of neutral employers. Initially, it must be stressed that in some instances the union threatened the store managers *directly*, at times before and at times even without actually handbilling the public. Clearly such threats and coercion, patently violative of the provision of Section (ii), cannot be immunized by the otherwise tenuous argument that the coercion was only "indirect" and therefore constitutionally protected.

Amici moreover attempt to evade the validity of restricting coercion upon neutral employers by so-called indirect methods. First, Amici argue that, unlike picketing, handbilling carries no "signal" to action on the

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from the subsequent opinion (*NLRB v. United Brotherhood*, 184 F. 2d 60, 62 (10 Cir. 1950)) and noted that it was denying certiorari in the latter case (341 U. S. 947) because of its decision in *Electrical Workers*.

part of the undisciplined public and does not coerce the consumer, because the only power of handbills is "the persuasive power of the words themselves." (Amici Brief, p. 12.) Such a proposition is naive on its face. A handbill bearing the word "unfair" would be no less persuasive and probably no less effective against the neutral employer than the same word on a picket.

The issue here is not whether the *public* is coerced, but whether the neutral *employer* is coerced; and unless Amici argue that only by coercing the public can the union coerce the employer, their argument reaches no conclusion of any assistance to the Court. Whatever effect handbilling may have on the public says nothing of its effect on the employer, which is amply proved here, since employers were in fact coerced into diminishing or ceasing business with Servette, even if consumer response itself may have been uncoerced. The impact of words alone, imprinted on a handbill, can coerce the employer who sees the handbill distributed when he realizes that his economic success is intimately involved with each consumer's "sympathetic response." And if the consumer is in fact persuaded and ceases to buy Servette products, coercion is even made more manifest.

In any event, Amici's error lies in treating picketing and handbilling as at the opposite ends of some constitutional spectrum, with picketing being coercive and therefore validly restricted, handbilling being simply persuasive and therefore protected at any cost.[13] But even if picketing has some special significance to union members, handbilling may still have *its* effect and *its* coercive significance. Both handbilling and picketing

[13] See Footnote 8, *supra*.

can be done at the *locus in quo*, each with an object forbidden by Congress, *i.e.*, each in an attempt to use third parties to coerce the neutral employer.

The conduct at issue here was certainly far more than simple speech,[14] for the union set out with the avowed purpose of forcing neutral employers into boycotting Servette and not only handbilled consumers at the employers' premises but also approached the store managers and threatened to handbill or continue to handbill unless and until they "knuckled under" and stopped doing business with Servette.[15] [R. 55-67.] The handbilling, coupled with the threats, under these circumstances loses even the alleged constitutional protection urged by Amici.[16]

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[14] *Talley v. California*, 362 U. S. 60 (1960), and other cases not involving restriction of speech when directed to an unlawful objective, are not relevant here.

[15] A clearly relevant inquiry is whether the Union handbilling here has not passed into the type of "commercial speech" that this Court has held has no first amendment protection. *Valentine v. Christensen*, 316 U. S. 52 (1942); see also the holding in *Thomas v. Collins*, *infra*, that whether speech is "commercial" turns on the facts of each case. 323 U. S. at 531.

[16] The threats themselves are violative of the statute and not constitutionally protected even assuming that the handbilling is constitutionally protected. As the court in *Brown v. American Federation of Television & R. Artists*, 191 F. Supp. 676, 679 (N. D. Cal. 1961) stated in virtually the same circumstances:

> In all events, even if respondents *were* entitled to publicize the facts by circulating such a leaflet, they were *not* entitled to threaten KXTV's advertisers, engaged in commerce, with such action, in order to force or require them to cease doing business with KXTV. It is *not* true that one may threaten to do whatever he may do. One may not threaten to take lawful action, where the purpose of the threat is illicit. Thus, a magazine editor may lawfully publish the truthful facts concerning unsavory incidents in the life of a person who is prominent in the public eye, such as a movie star or politician; but the magazine editor may not lawfully threaten to publish such facts unless the person concerned pays blackmail to the editor.

This Court in *Thomas v. Collins*, 323 U. S. 516, 537-538 (1945)—and again in *Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 503 n. 6 (1949)—said when referring to the right to limit coercive use of speech:

> When to this persuasion other things are added *which bring about coercion, or give it that character*, the limit of the right has been passed. *Cf. Labor Board v. Virginia Electric & Power Co., supra* [314 U. S. 469, 477-478]. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. (Emphasis added.)[17]

The union conducted no mere "informational exercise" and might well have considered public response irrelevant, inasmuch as when individual employers once were coerced the union apparently no longer felt the urge to handbill.

Conclusion.

For the foregoing reasons the judgment and order of the court below should be affirmed and the arguments raised by Amici should be rejected.

Respectfully submitted,

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[17] In *Bakery Drivers Local v. Wohl*, 315 U. S. 769, 775 (1942) this Court reversed the state court because the latter failed to find "that the publication was attended or likely to be attended by violence, force, or *coercion, or conduct otherwise unlawful or oppressive*." (Emphasis added.)